IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 22ND JUNE 2007 / 1ST ASHADHA 1929

SA.No. 262 of 1994()

OS.104/1982 of MUNSIFF, KASARAGOD
A.S.55/1989 of SUB COURT, KASARAGOD

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APPELLANT: 2ND RESPONDENT/3RD DEFENDANT

A.PRABHAKARA RAI,
VIJAYAMAHAL, PADUBINDRI.P.O.
PADUBIDRI, DAKSHINA KANNADA DISTRICT
KARNATAKA.

BY ADV. SRI.SUBHASH CYRIAC

RESPONDENT:APPELLANT/PLAINTIFF

BALAPPA SHETTY, MANNOR HOUSE,
KULOOR P.O. KASARAGOD DISTRICT.

BY ADV. SRI.M.C.SEN (SR.)
SRI.PRAKASH THOMAS
SRI.A.PARVATHI MENON
SMT.PREMRA

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 22/06/2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.262 OF 1994

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Dated this the 25th day of June, 2007

JUDGMENT

Third defendant in O.S.104/1982 on the file of Munsiff Court, Kasaragod is the appellant. Plaintiff is the sole respondent. Respondent instituted the suit seeking a decree for a declaration of his right title and possession over the plaint schedule property. The case of the appellant was that he obtained plaint schedule from Sankara Bhandary thirty five years back on lease and since then he has been in possession and enjoyment of the property and while so, he purchased jenm right from the Land Tribunal as per order in O.A.3723/1976 and defendants were aware of the tenancy but in collusion with them, plaint schedule property was sold in execution of the decree in O.S.45/1973 on the file of Sub Court, Kasaragod and was purchased by third defendant/appellant and the 4th defendant, who

mortgaged the property and against whom the decree was obtained by defendants 1 and 2 had no right over the plaint schedule property and therefore third defendant did not derive any right in the court auction sale and confirmation of the court auction sale is invalid and is not binding on the plaintiff or the plaint schedule property. Appellant therefore sought a decree for declaration to that effect and a decree for injunction restraining third defendant from taking possession of the property under the sale certificate. Subsequently plaint was got amended raising a contention that he is a deemed tenant as defined under Kerala Land Reforms Act as he has been in possession of the plaint schedule property for not less than two years within a period of twelve years immediately proceeding the 11th day of April, 1967. First defendant died while the suit was pending and though his legal heirs were impleaded, they remained absent. So also the second defendant. The 4th defendant though appeared did not file a

written statement. Third defendant resisted the suit contending that there was no lease as alleged by the plaintiff and the order obtained from the Land Tribunal was fraudulent and collusive and against the order appeal is filed before the Appellate Authority (LR) and plaint schedule property was one of the items in the final decree in O.S.79/1965 on the file of Sub Court, Kasaragod. Though in the final decree proceedings plaintiff claimed tenancy right, that was negatived by the court and therefore the plaintiff is not entitled to contend that he is a cultivating tenant and 4th defendant had right over the property which was sold in court auction sale and purchased by third defendant and hence plaintiff is not entitled to the decree sought for. Learned Munsiff on the evidence of PW1, DW1 and Exts.A1 to A7 and Exts.B1 to B8 and Ext. C1 relying in Ext.B1 and B2 order and the final decree in O.S.79/1965, held that plaintiff is not a tenant entitled to fixity of tenure and therefore plaintiff is not entitled to

the decree sought for. The suit was dismissed. Plaintiff challenged the decree and judgment before Sub Court, Kasaragod in A.S.55/1989. Learned Sub Judge relying on Ext.A5 stay order passed in S.A.87/1982 filed by the respondents in the final decree who claimed tenancy right in the final decree proceedings including the plaintiff, held that findings in Exts.B1 and B2 that plaintiff is not a cultivating tenant has not become final. Thereafter analysing the evidence first appellate court upheld the claim of tenancy and allowed the appeal and granted a decree as sought for. The judgment and decree passed by first appellate court is challenged in this Second Appeal.

2. The Second Appeal was admitted formulating the following substantial question of law.

When under Ext.B1 judgment the claim for tenancy was negatived by the Sub Court, whether the first appellate court was justified in upholding the claim of tenancy and granting a decree sought for?

3. Learned counsel appearing for appellant and learned senior counsel appearing for respondent were heard.

4. Admittedly plaint schedule property was one of the items sought to be partitioned in O.S.79/1965. 4th defendant in the present suit was the third defendant in that suit. When that final decree application was filed before Sub Court, Kasaragod in O.S.79 of 1965 and the Commissioner inspected the property, respondents 12 to 21 therein were impleaded contending that they are cultivating tenants entitled to fixity of tenure. Plaintiff was 17th respondent in the final decree proceedings. The contention raised by the plaintiff in the final decree proceeding was the same contention raised in the present suit namely he obtained the leasehold right from Sankara Bhandary as per a lease 35 years back. Sub Court on the evidence negatived the claim and held that respondents who claimed tenancy are in fact not cultivating tenants entitled to the benefit of

Kerala Land Reforms Act. But finding that 4th defendant herein had supported the alleged tenancies and orders from the Land Tribunal were obtained in his presence, while allotting the shares, learned Sub Judge allotted the properties claimed by respondents 16 to 21 to the shares of the defendants 1 to 4. Challenging the said allotment and contending that properties claimed by tenants should not have been allotted to their share, defendants 1 to 4 filed A.S.28/1982 before this court. Respondents 12,17, 18 and 21 who claimed tenancy challenged the judgment of the learned Sub Judge negativing the claim for tenancy before this court in A.S.87/1982. Plaintiffs herein was one of the appellants in A.S.87 of 1982. Both the appeals were heard and disposed by common judgment dated 7.12.1993. The Division Bench of this court analysing the evidence found that none of the respondents in the final decree, who claimed tenancy including plaintiff herein are tenants entitled to the benefit of the Kerala Land Reforms

Act. A.S.87/1982 was dismissed upholding the finding of the Sub Court that they are not tenants. In the light of the judgment in A.S.28/1982 and 87/1982, which has become final and binding on the respondent plaintiff herein respondent is not entitled to contend that he is a cultivating tenant entitled to fixity of tenure. The finding against him in the final decree proceedings has become final. Therefore finding of first appellate court that respondent is a tenant and therefore entitled to a decree for declaration is unsustainable.

5. Learned Senior counsel argued that as per the findings in A.S.28/1982 and A.S.87/1982, properties claimed by the plaintiff was allotted to defendants 1 to 4 including 4th defendant herein and this court found that the purchase certificate was obtained by him with 4th defendant in the party array and therefore that purchase certificate is binding as against for defendants 1 to 4 and appellant being a purchaser of the rights of 4th

defendant in the court auction sale cannot claim a better title than what 4th defendant had and therefore appellant is not entitled to dispute the status of the respondent as a tenant and so there is no reason to interfere with the decree. I cannot agree with the argument advanced. What was found by this court was that the tenancy claimed by the respondents in the final decree including the respondent was not genuine and it was collusive and projected after the final decree proceedings were initiated. As the plaintiff was found to be not tenant on the date when the property was sold in court auction, 4th defendant was the owner of the property. That right was purchased by the appellant. Therefore respondent is not entitled to contend that he is a cultivating tenant entitled to the fixity of tenure.

Second Appeal is allowed. The decree and judgment of the Sub Court, Kasaragod in A.S.55/1989 is set aside and that of the Munsiff, Kasaragod in O.S.104/1982 is restored. The suit stands

dismissed.

The appeal is allowed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006